

LETTER OPINION
99-L-78

September 9, 1999

Ms. Sharon Gallagher
Mandan City Attorney
205 2nd Ave NW
Mandan, ND 58554

Dear Ms. Gallagher:

Thank you for your letter regarding the appointment of a current city commissioner, who is an attorney, as city attorney. I understand that your questions have changed slightly due to events which have occurred since you originally requested this opinion.

Your first question, whether a city commission may appoint one of its members as city attorney, is answered by N.D.C.C. § 40-09-17, which states:

No member of the board of city commissioners shall:

1. Be eligible to any other office the salary of which is payable out of the city treasury;
2. Hold any other office under the city government; and
3. Hold a position of remuneration in the employment of the city.

See also N.D.C.C. §§ 40-04.1-04 (modern council cities), 40-08-09 (council cities). The position of city attorney is a city office under a commission form of city government. 1995 N.D. Op. Att'y Gen. L-174 (July 24 letter to Gordon); Letter from Attorney General Nicholas Spaeth to Hugh Seaworth (Apr. 7, 1987), citing N.D.C.C. §§ 40-14-04 (council cities) and 40-15-05 (commission cities). Accordingly, it is my opinion that a city commissioner is prohibited under N.D.C.C. § 40-09-17 from serving as both a city commissioner and city attorney. It is my further opinion this prohibition applies regardless of whether the city attorney is employed by the city or is on retainer as an independent contractor and paid with city funds.

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You next ask whether N.D.C.C. § 40-09-17 effectively requires the attorney-commissioner to resign before being considered for appointment as city attorney. N.D.C.C. § 40-09-17 has been described by this office as a codification of the common law doctrine of incompatibility of offices. Letter from Attorney General Nicholas Spaeth to Ronald Dosch (Mar. 25, 1992).

"[I]t is a well settled rule of the common law that a person may not, at one and the same time, rightfully hold two offices which are incompatible." . . . Two offices or positions are incompatible when one has the power of appointment to the other or the power to remove the other, and if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment.

Tarpo v. Bowman Public School Dist. No. 1, 232 N.W.2d 67, 70-71 (N.D. 1975), quoting State v. Lee, 50 N.W.2d 124 (N.D. 1951). As Attorney General Spaeth concluded in his 1992 letter, the common law doctrine of incompatibility of offices for city commissioners is displaced by N.D.C.C. § 40-09-17. See N.D.C.C. § 1-01-06 ("there is no common law in any case where the law is declared by the code"). However, because both N.D.C.C. § 40-09-17 and the doctrine of incompatibility of offices serve similar purposes, it is helpful to examine how the courts have applied the doctrine.

Both the incompatibility of office doctrine and N.D.C.C. § 40-09-17 prevent a person from holding incompatible offices at the same time. Thus, in Tarpo, a school teacher who was elected to the incompatible position of school board member was required to choose which position to vacate. 232 N.W.2d at 71. If a person refuses to choose between incompatible offices, or accepts the second office knowing that it is incompatible with the person's current office, the person is deemed to have vacated his or her current office. See State v. Lee, 50 N.W.2d at 126 ("acceptance of a second office incompatible with the first vacates first office"); Letter from Attorney General Nicholas Spaeth to Maury Thompson (Dec. 2, 1985); Letter from Attorney General Allen Olson to A.S. Benson (Feb. 7, 1979). It is my opinion that the attorney-commissioner, if offered an appointment as city attorney, must choose between declining the appointment or resigning as city commissioner. If the attorney-commissioner accepts the appointment to the incompatible office of city attorney without choosing which office he or she will vacate, the attorney-commissioner is deemed to have vacated his or her first office as city commissioner.

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Your last question is what involvement, if any, the attorney-commissioner may have in the city commission's deliberations regarding the appointment of a city attorney if the attorney-commissioner has applied for the position. Whether a conflict of interest exists is usually a question of fact to be resolved by the local governing body rather than in an Attorney General's opinion. 1999 N.D. Op. Att'y Gen. L-59, L-60. However, when provided sufficient facts, this office has issued an opinion on whether a conflict exists in a given situation. See, e.g., 1996 N.D. Op. Att'y Gen. L-235 (Dec. 13 letter to Traynor); 1995 N.D. Op. Att'y Gen. 21. The situation you describe is fairly straightforward: having applied for the office of city attorney, the attorney-commissioner clearly would have an interest in the city commission's appointment of a person to that office. Such an interest is prohibited by N.D.C.C. §§ 12.1-13-03 and 40-13-05.¹

At odds with the statutes prohibiting a city commissioner from having an individual interest in city business is the attorney-commissioner's duty to vote on all matters of city business. Due to the potential for "obstructive inaction" by members of a governing body who attempt to abstain from voting because of a conflict of interest, the North Dakota Supreme Court has held that a member of a city governing body who is present when a vote is taken has a duty to vote, unless excused from voting by law. Northwestern Bell Tel. Co. v. Bd. of Comm'rs of City of Fargo, 211 N.W.2d 399 (N.D. 1973). A member who is present but abstains from voting is deemed to have voted with the majority. Id. at 404. See also 1995 N.D. Op. Att'y Gen. 21.

There are few state statutes which authorize public officials to abstain from voting. One such statute is N.D.C.C. § 44-04-22:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and

¹ For an interest not to be prohibited under these sections, the other members of the city commission must unanimously agree that the services are not otherwise available at equal cost. I agree with your conclusion that this exception does not apply to the situation presented in this opinion because the city commission has set a specific retainer fee for the position and has received multiple applications from qualified attorneys for the position.

may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

(Emphasis added.) "[N.D.C.C. § 44-04-22] is the only statute that authorizes or requires a member of a city governing body to abstain from voting." 1995 N.D. Op. Att'y Gen. at 23. Curiously, this statute does not apply to persons acting in an executive capacity for a political subdivision, nor does it apply to state officials. The power to appoint to an office is intrinsically an executive power. State ex rel. Johnson v. Myers, 19 N.W.2d 745, 750 (N.D. 1945); State ex rel. Standish v. Boucher, 56 N.W. 142, 147 (N.D. 1893). Accordingly, N.D.C.C. § 44-04-22 does not apply to the situation you describe and there currently is no North Dakota law which specifically authorizes a city commissioner to abstain from voting on an executive matter, such as appointment of a city attorney, in which the commissioner has a conflict of interest.

This office has previously addressed the dilemma faced by members of a governing body of a governmental entity when they are prohibited from having an interest in a matter involving that entity yet there is no statute authorizing the official to abstain from voting on that matter. I have previously concluded that the rule first enunciated in Northwestern Bell requiring members of a governing body to vote should be limited to situations where a member is acting in a legislative capacity or where the language of a particular statute controls whether a member may abstain. 1994 N.D. Op. Att'y Gen. L-327 (Dec. 13 letter to Mattson). I further concluded that a court, in the absence of controlling statutes, would likely apply the appearance of impropriety doctrine when reviewing whether a member of a governing body could vote on a matter in which the member was interested. Id. at L-329.

The 1994 opinion to Mattson has largely been superseded by the 1995 enactment of N.D.C.C. § 44-04-22 (quoted above) for legislative matters. However, the discussion of the appearance of impropriety doctrine in that opinion applies equally to executive matters, which are not governed by N.D.C.C. § 44-04-22. Here, because state law neither requires nor prohibits the attorney-commissioner from voting on the appointment of a city attorney despite the fact that the attorney-commissioner is personally interested in the position, it is my opinion that a court would likely apply the appearance of impropriety doctrine to determine whether the attorney-commissioner could vote or otherwise participate in the city commission's deliberations regarding that appointment.

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The application of the appearance of impropriety doctrine in the 1994 opinion to Mattson was clarified a few months later:

In applying the appearance of impropriety doctrine to a legislative matter, I believe the North Dakota Supreme Court would take into account the type and degree of personal interest involved. The more the type of interest is unique to the county commissioner, and the more substantial the interest, the greater the likelihood of the North Dakota Supreme Court's determining that the interest involved raises a reasonable question as to the county commissioner's impartiality.

1995 N.D. Op. Att'y Gen. L-60, L-61 (Mar. 9 letter to Mattson).

In the situation you present, the attorney-commissioner's interest in the city commission's selection of a city attorney is personal, unique to that commissioner, and substantial (you indicate the retainer fee for the position is \$3,200 per month). Despite the best efforts and intentions of the attorney-commissioner, the involvement of the attorney-commissioner in the selection of a city attorney would create an unavoidable appearance of impropriety. It is my opinion that a court would apply the appearance of impropriety doctrine and conclude that the attorney-commissioner may not be involved in the city commission's selection of a city attorney. Therefore, the attorney-commissioner should refrain from voting or participating in the city commission's deliberations regarding the appointment of a city attorney.

Sincerely,

Heidi Heitkamp
Attorney General

jcf/vkk